



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 217

[Docket DARS-2019-0004]

RIN 0750-AJ72

Defense Federal Acquisition Regulation Supplement:

Undefinitized Contract Actions (DFARS Case 2018-D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 and a section of the National Defense Authorization Act for Fiscal Year 2018 to revise requirements for definitizing undefinitized contract actions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D008, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2018-D008." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D008" on any attached documents.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2018-D008 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and section 815 of the NDAA for FY 2018 (Pub. L. 115-91). Section 811 modifies restrictions on

undefinitized contractual actions (UCA) regarding risk based profit, time for definitization, and foreign military sales. Section 815 establishes limitations on unilateral definitizations of UCAs over \$50 million.

II. Discussion and Analysis

This rule proposes to make the following amendments to DFARS:

- If a UCA is definitized after the end of the 180-day period beginning on the date the contractor submits a qualifying proposal, the head of the agency shall ensure profit reflects the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

- The definitization of a UCA may not be extended by more than 90 days beyond the maximum 180-day definitization schedule negotiated in the UCA without a written determination by the Secretary of the military department concerned, the head of the defense agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment, that it is in the best interests of the military department, the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action.

- Contracting officers of the Department of Defense may not enter into a UCA for a foreign military sale unless the contract action provides for definitization within 180 days and the

contracting officer obtains approval from the head of the contracting activity. The head of the agency may waive this requirement if necessary to support a contingency or humanitarian or peacekeeping operation.

- Contracting officers may not unilaterally definitize a UCA with a value greater than \$50 million until—

- o The end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or the date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action;

- o The service acquisition executive for the military department that awarded the contract or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a defense agency or other component of the Department of Defense, approves the definitization in writing;

- o The contracting officer provides a copy of the written approval to the contractor; and

- o A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

- The definition of "qualifying proposal" is being amended to align with the statutory definition at 10 U.S.C. 2306, which is a proposal that contains sufficient information to enable DoD to

conduct a "meaningful audit" instead of a "complete and meaningful audit."

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and Contracts for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Orders 13771

This rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify requirements on undefinitized contractual actions (UCAs) regarding calculations of risk-based profit objectives, timing for definitizations, foreign military sales, and limitations on unilateral definitizations of UCAs over \$50 million, in accordance with recently enacted statutory requirements.

The objective is to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and section 815 of the NDAA for FY 2018 (Pub. L. 115-91).

With regard to potential profit impacts, DoD estimates that this rule will impact approximately 470 contracts per year, primarily awarded to other than small entities, where definitization is extended beyond 180 days after receipt of a qualifying proposal.

The proposed rule does not include additional reporting or record keeping requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D008), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215 and 217

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 217 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 215 and 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. In section 215.404-71-3, revise paragraph (d)(2)(i) to read as follows:

215.404-71-3 Contract type risk and working capital adjustment.

* * * * *

(d) * * *

(2) * * *

(i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a) and 243.204-70-6). When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type. However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal (as defined in 217.7401(c)), the profit allowed on the contract shall

accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

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PART 217—SPECIAL CONTRACTING METHODS

217.7401 [Amended]

3. In section 217.7401, amend paragraph (c) introductory text by removing "complete and".

217.7402 [Amended]

4. Amend section 217.7402 by—

- a. Removing paragraph (a)(1);
- b. Redesignating paragraphs (a)(2) through (4) as paragraphs (a)(1) through (3); and
- c. In the newly redesignated paragraphs (a)(1) and (2), remove the semicolons and replace them with periods.

5. Revise section 217.7404 to read as follows:

217.7404 Limitations.

See PGI 217.7404 for additional guidance on obtaining approval to authorize use of an undefinitized contact action, documentation requirements, and other limitations on their use.

(a) *Foreign military sales contracts.* (1) A contracting officer may not enter into a UCA for a foreign military sale unless—

(i) The contract action provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal; and

(ii) The contracting officer obtains approval from the head of the contracting activity to enter into a UCA in accordance with 217.7404-1.

(2) The head of an agency may waive the requirements of paragraph (a)(1) of this section, if a waiver is necessary in order to support any of the following operations:

(i) A contingency operation.

(ii) A humanitarian or peacekeeping operation.

(b) *Unilateral definitization by a contracting officer.* Any UCA with a value greater than \$50 million may not be unilaterally definitized until—

(1) The earlier of—

(i) The end of the 180-day period, beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(ii) The date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action;

(2) The service acquisition executive for the military department that awarded the contract or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a defense agency or other component of the Department of Defense, approves the definitization in writing;

(3) The contracting officer provides a copy of the written approval to the contractor; and

(4) A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

6. Amend section 217.7404-3 by revising paragraph (a)(1) to read as follows:

217.7404-3 Definitization schedule.

(a) * * *

(1) The date that is 180 days after the contractor submits a qualifying proposal. This date may not be extended beyond an additional 90 days without a written determination by the Secretary of the military department concerned, the head of the defense agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment that it is in the best interests of the military department, the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action; or

* * * * *

217.7404-5 [Amended]

7. Amend section 217.7404-5, in paragraph (b) introductory text, by removing "217.7404-2" and adding "217.7404(a), 217.7404-2" in its place.

8. Amend section 217.7404-6 by revising paragraph (a) to read as follows:

217.7404-6 Allowable profit.

* * * * *

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. However, if a contractor submits a qualifying proposal to definitize a UCA and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal;

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